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December 1, 1997

BY HAND

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

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DEC 1 - 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

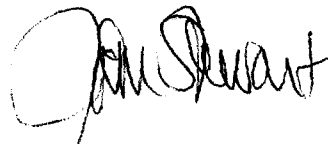
Re: Reply Comments in MM Docket No. 97-182

Dear Mr. Caton:

Transmitted herewith for filing on behalf of the Electromagnetic Energy Association are an original and 9 copies of its "Reply Comments" in the above-captioned proceeding.

Should there be any questions, please contact the undersigned counsel.

very truly yours,



John I. Stewart, Jr.

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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DEC 1 - 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Preemption of State and)
Local Zoning and Land Use)
Restrictions on the)
Siting, Placement and)
Construction of Broadcast)
Station Transmission)
Facilities)

MM Docket No. 97-182

To: The Commission

**REPLY COMMENTS OF THE
ELECTROMAGNETIC ENERGY ASSOCIATION**

I. INTRODUCTION

The Electromagnetic Energy Association ("EEA") is a coalition of companies and trade associations representing a broad spectrum of communications businesses, from broadcasting to cellular to the full range of other land mobile communications services, such as paging, specialized mobile radio, broadband and narrowband personal communications services and two-way radio dispatch services.¹ EEA's principal objective is the advancement of knowledge about

¹ EEA was first formed in 1984 as the "Electromagnetic Energy Policy Alliance." It has taken an active role in promoting informed decisionmaking on public policy relating to the safe use of electromagnetic energy, as to which its members have a unique and authoritative body of knowledge.

electromagnetic energy issues associated with the operation of communications facilities and devices.

FCC preemption of state and local regulation of electromagnetic energy, which is constitutionally permissible, is crucial to attaining the social, technological and economic benefits of DTV. Such advancements cannot be realized if the construction of FCC-authorized DTV facilities is delayed or precluded altogether by inconsistent state or local electromagnetic energy standards. Moreover, the Commission should adopt a preemption rule that frees all broadcast facilities from the burdens of conflicting state and local RF emission standards. To do otherwise would result in an arbitrary regulatory environment in which broadcast facilities with identical characteristics would be subject to inconsistent requirements.

II. THERE IS A BROAD RECORD BASIS FOR PREEMPTION OF STATE AND LOCAL RF EMISSION STANDARDS.

The record includes substantial support for federal preemption of conflicting state and local RF emission regulations. See e.g., Comments of New Jersey Broadcasters Association at 8; Joint Comments of Paxson Communications Corporation, Cox Broadcasting, Inc., and Media General, Inc., ("Paxson") at 6; Comments of the American Radio Relay League, Inc., at 5-6. Commenters who specifically object to such preemption provide no compelling reasons to reject the Commission's proposed rule.

Even many of the commenters who oppose broader preemption, such as the

rule proposed by the National Association of Broadcasters and the Association for Maximum Service Television, do not object to preemption of state and local RF emission requirements. For example, the City and County of Honolulu express concern about what they perceive as the breadth of the proposed rules. However, they "do not object to preemption of regulations based on radio frequency (RF) emissions" when FCC requirements have been met. Comments of City and County of Honolulu at 1. See also, e.g., Comments of Clackamas County at 2; Comments of Kern County, California Planning Dept. at 3; Comments of Orange County, Florida, at 7.

Some commenters oppose preemption on the ground that the Commission's RF regulatory scheme relies on self-enforcement and is thus inadequate. Although it is true that the Commission relies on broadcaster diligence and self-certification, this system has been effective for many years. See Comments of NAB at 13. The potential consequences to a broadcaster for misrepresentation are severe, and the FCC has had long experience in enforcing its own rules. It thus cannot be assumed that there is or would be widespread non-compliance, and a preemption policy cannot be based on such an assumption. The additional burdens and potential for inconsistent requirements that would result from building in a new layer of state and local regulation of federal RF requirements could not possibly be justified.

Moreover, "current FCC RF emissions guidelines are comprehensive and adequate to apprise state and local governments of the environmental implications

of broadcast construction applications." See Comments of NAB at 13-14. State and local governments have access to broadcasters' certification applications, and they may review those materials for purposes of assuring themselves that the FCC's RF regulations have been complied with. It is unnecessary to interpose a local approval process to achieve this result.

III. THE COMMISSION HAS THE AUTHORITY TO PREEMPT STATE AND LOCAL REGULATION THAT UNDULY IMPEDES THE IMPLEMENTATION OF FEDERAL POLICY

Some commenters who oppose NAB's proposal do so based on the mistaken argument that the Commission lacks the Constitutional authority to preempt such state and local regulations. See e.g., Comments of National League of Cities at 16; Comments of Clark County Department of Aviation at 1-2; Comments of the State of Vermont Office of the Attorney General at 7. However, the Commission clearly has the power, when "acting within the scope of its congressionally delegated authority," to preempt state or local regulation that conflicts with federal law and "stands as an obstacle to the accomplishment and execution of the full objectives of Congress." Louisiana Public Service Comm'n v. FCC, 476 U.S. at 368-69 (1986) (*citing* Hines v. Davidowitz, 312 U.S. 52 (1941)). In the case of electromagnetic energy regulations applicable to FCC-licensed transmission facilities, both preconditions for exercising federal preemption are fully satisfied.

A. The Commission's Adoption of RF Radiation Standards Is "Within the Scope of its Congressionally Delegated Authority."

The Communications Act specifies that the Commission's purpose is "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151. In furtherance of this essential purpose, the Commission is granted the power to "make such rules and regulations, and issue such orders, not inconsistent with [the Act] as may be necessary in the execution of its functions." 47 U.S.C. §154(i). The Act thus plainly authorizes FCC regulations governing electromagnetic energy emitted by FCC-licensed transmitters.

Moreover, the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.* provides specific supplemental authority to the Commission to evaluate the environmental effects of licensed transmitters and to impose conditions under which such transmitters may be operated. See 42 U.S.C. § 4335 (policies and goals set forth in NEPA are "supplementary to those set forth in existing authorizations of Federal agencies"). Adopting electromagnetic energy standards is thus within the Commission's delegated authority, under both the Communications Act and NEPA.

B. Inconsistent State and Local Regulation of RF Energy From FCC-Licensed Antenna Facilities "Stands as an Obstacle to the Accomplishment and Execution of the Full Objectives of Congress."

State or local regulation that is inconsistent with the Commission's own standards also "stands as an obstacle to the accomplishment and execution of the full objectives of Congress." Where the state or local RF emission regulation impedes, delays, or precludes the construction or operation of a DTV facility, it will prevent the expeditious and efficient provision of this important new communications service. The Commission can and should preempt such inconsistent regulation in order to accomplish the policies Congress has directed it to promote.

The Commission found in the Fifth Report and Order in the DTV proceeding, 62 Fed. Reg. 26996, and reiterated in this NPRM, that the efficient roll-out of DTV serves important federal policies for four reasons: First, obstruction to the roll-out schedule would preclude "a free, universally available digital programming service." NPRM, ¶ 10. Second, the rapid roll-out is crucial to "spurring the American economy in terms of manufacturing, trade, technological development, international investment, and job growth." Id. Third, a passive schedule might discourage individual broadcasters from beginning digital transmissions. Finally, an accelerated schedule would promote the prompt recovery of broadcast spectrum. These important policies cannot be achieved if state and local regulators are allowed to obstruct the use of transmitter sites needed to provide DTV service or to impose costs and other regulatory burdens on

FCC licensees that make it more difficult and expensive to provide DTV service.

The record is replete with examples of FCC licensees being burdened by the application of state or local RF emission standards and review procedures that duplicate or exceed FCC RF exposure rules. See e.g. Comments of Cosmos Broadcasting Corporation at 2; Comments of Fant Broadcasting Company at 3-4. Despite this and other evidence, the Local and State Government Advisory Committee ("LSGAC") asserts that "there is no real overlap in the federal and local review and regulatory processes for broadcast facilities." Comments of LSGAC, at 3.

LSGAC fails to recognize that over the last ten years, the amount of diversity of state and local regulation of electromagnetic energy has dramatically increased. Such regulation takes the form not only of statutes and ordinances imposing explicit electromagnetic energy standards but also of case-by-case evaluations of the environmental effects of electromagnetic energy in the course of zoning and other regulatory proceedings. In many cases, such regulation may condition operation of antenna facilities on compliance with a standard inconsistent with the Commission's RF standards or require Commission licensees to prove that their proposed transmissions are within some ill-defined "safe" level of RF emissions, even though the licensees are in full compliance with the Commission's RF standards. EEA provided examples of such problems in its Petition For Further Notice of Proposed Rulemaking ("EEA Petition"), at 16-18, filed in the RF Radiation proceeding, ET Docket No. 93-62.

For example, in West Hollywood, California, the City Council passed resolutions denying the addition of towers at two locations. Both had been approved by the Planning Commission, but an appeal was taken to the Council based on health concerns. Although the Council's decision was not based on any specific power limits, it denied both applications, stating that "[t]he evidence put forth by the applicant and others in support of the project was inconclusive because no witness or evidence presented concluded that the proposed use of the property was safe." EEA Petition at 17 (quoting City of West Hollywood City Council Resolution Nos. 1160 and 1161 (July 1993)).

In another case, the licensee of KBVU(TV) was forced to relocate an antenna after its site application was denied by the Eureka, California, Planning Commission, based on the amount of RF energy that would be created at an antenna farm. The Planning Commission was asked whether it would reconsider the application if it were shown that the FCC approved the additional radiation at the site under ANSI standards, but it rejected that proposal, stating that the FCC's determination would make no difference. EEA Petition at 17 (citing Report of Chester Smith, General Partner, KBVU(TV)).

Moreover, local regulatory decisions cannot be expected to take proper account of the goals of the Commission and Congress to achieve the federal plan for the simultaneous roll-out of DTV services throughout the nation. The result of these regulatory incursions by state and local governments is an uneven and inconsistent system of regulatory requirements for Commission licensees, which

obstructs the full realization of the Commission's goals and policies.

IV. THE PREEMPTION OF STATE AND LOCAL RF EMISSION STANDARDS SHOULD EMBRACE ALL BROADCAST TRANSMISSION FACILITIES, NOT SIMPLY DTV FACILITIES.

Preemption of RF emission standards should apply to all broadcast facilities. From the perspective of health and safety, there should be no distinction among various transmitters emitting RF energy (other than technically justified differences in RF limits, which are already accommodated by the proper RF rules). And from the perspective of a scientific and technical evaluation of potential exposure, distinctions based on the type of broadcast transmitter utilized make no sense, especially in a digital environment.

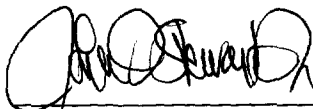
NAB's comments correctly highlight that a "[f]ailure to adopt uniform preemption will likely lead to protracted and unproductive disputes concerning whether a particular project is 'DTV-related' -- an issue which. . . may be difficult to resolve." Comments of NAB at 8. As NAB explains, the conversion to DTV will result in extensive relocation of FM antennas, which in turn displace other antennas at other locations. Incomplete preemption will unfairly require radio broadcasters to demonstrate that a relocation is caused by DTV implementation in order to avoid conflicting local or state standards. EEA agrees that incomplete preemption will "create confusion and frustration, leading to delays and additional expense, precisely what is sought to be avoided in this proceeding." Comments of NAB at 9.

V. CONCLUSION

For the reasons stated above, EEA respectfully urges the Commission to preempt state and local regulation of RF energy emissions that is inconsistent with the Commission's regulations for all FCC-authorized broadcast transmission facilities.

Respectfully submitted,

ELECTROMAGNETIC ENERGY
ASSOCIATION

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Its Counsel

December 1, 1997